IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:	
JAMES TRACY SMALL and JEANNE LYNN SMALL,	**CASE NO. 99-41672-7**
DEBTORS.	

ORDER GRANTING OBJECTIONS TO DEBTORS' AMENDED HOMESTEAD CLAIM

This matter is before the Court on the objection of both the Chapter 7 Trustee, Joseph I. Wittman, and creditor Gold Bank, formerly known as Exchange National Bank, to Debtors' amended Schedule C (Doc. No. 110). In that amended Schedule C, Debtors claim, among other things, a homestead exemption in different real property than they originally claimed as exempt when they filed their bankruptcy petition twenty-two months earlier. The parties have submitted a Stipulation of Facts and briefs in support of their positions. The Court has reviewed the relevant materials, and is now ready to rule on the homestead issue.

This exemption dispute is a matter arising in a case under Title 11, so the Court has jurisdiction under 28 U.S.C.A. §1334(b). This is a core proceeding that this Court may hear and determine pursuant to 28 U.S.C.A. §157(b)(1) and (b)(2)(B).

I. FACTS

The parties have submitted a Stipulation of Facts, and the Court has supplemented that Stipulation with additional facts drawn from pleadings and other items contained in the Court file.[1] At the time James Tracy Small and Jeanne Lynn Small filed their Chapter 13 bankruptcy petition on July 26, 1999, they lived in a house at 1110 Calhoun Street in Marysville, Kansas, and claimed it as their exempt homestead. Gold Bank had first and second mortgages on that house.

The Smalls filed a Chapter 13 plan that paid Gold Bank's first mortgage directly, and its second mortgage in full through the plan. The plan was orally confirmed at a hearing November 17, 1999 and the Order of Confirmation was entered December 20, 1999. At about the time of the confirmation, and thus clearly within 180 days of filing bankruptcy, Ms. Small called the Chapter 13 Trustee's office to report that her mother had passed away.

Ms. Small inherited some assets from her mother, and among them was a house apparently unencumbered by debt, located at 706 N. 12th Street, also in Marysville. The Smalls were not residing in this home either at the time of filing, or at the time of the mother's death. Nothing in the record indicates there was anything about the house that prevented the Smalls from moving into it at any time after the death. Debtors did not file a supplemental schedule within ten days after learning of the inheritance, nor did they amend any claimed exemptions within 10 days, as required by Federal Rule of Bankruptcy Procedure 1007(h). They also did not file a motion to extend the deadline for filing such supplemental schedules or exemptions, and thus the Court never extended that time. Instead, the

---

[1] *See In re Applin*, 108 B.R. 253, 257 (Bankr. E.D. Cal. 1989) (holding that judicial notice of basic filings in the bankruptcy case is permissible to fill in gaps in the evidentiary record of a specific adversary proceeding or contested matter).

Smalls waited approximately eighteen months after the death, until May 2001, to amend their schedules to include the inherited assets and change their exemptions.

The Chapter 13 Trustee tried to investigate Ms. Small's inheritance, but had difficulty obtaining information from the Smalls. They failed to appear at a January 6, 2000 meeting the Trustee had scheduled to question them about the inheritance, so he moved to dismiss their case. (Doc. Nos. 24 and 28) They responded that they would, in fact, appear at a rescheduled meeting, and provide information about Ms. Small's mother's estate, but they again failed to appear when it was rescheduled for February 10, 2000. Accordingly, in February 2000, the Trustee filed a motion to require the Smalls to show cause why they should not be held in contempt for failing to appear at the two meetings.

On February 14, 2000, at least according to the Trustee, Mr. Small called and reported that Ms. Small had moved to Nebraska, and that Ms. Small's mother had left them an unencumbered house, some "lake view property," a car, and a $75,000 life insurance policy (Doc. No. 32, ¶8). The Trustee then filed a motion to convert the case to Chapter 7, alleging bad faith by Debtors in "willfully failing to comply with requests from the Trustee to provide information" about the inheritance. At a hearing on the show cause matter, the Smalls indicated they would file an amended Chapter 13 plan, to avoid conversion, and they did so on April 25, 2000 (Doc. No. 43).

On April 12, 2000, the Smalls' attorney sent a letter to the Court reporting that the Smalls' address had changed to 706 North 12th Street—the address of the inherited house. In the amended plan they filed on April 25, 2000, however, the Smalls proposed to sell the real property securing Gold Bank's claims, the Calhoun Street property they lived in at the time of filing bankruptcy, for an amount sufficient to pay both of the bank's mortgages. In the plan, they referred to this house as still being their

"residence." (Doc. No. 43) No objections were filed and the amended plan was confirmed the following month. Similarly, in a February 28, 2000, letter to the Trustee, the Debtors' attorney referred three separate times to the Calhoun Street property as their "residence." *See* Exhibit 1 to Gold Bank's Memorandum, Doc. No. 142.

On August 4, 2000, the Chapter 13 Trustee moved to dismiss the case because the Smalls had failed to make two monthly plan payments. Two weeks later, he amended his motion to seek conversion as an alternative to dismissal. The Smalls responded that they were then trying to sell the house that Ms. Small inherited from her mother, and that they had some prospective buyers (Doc. No. 59). They indicated the sale should pay all their creditors in full. On September 25, 2000, the Court orally granted the Trustee's motion to convert the case, and a written order to that effect was entered a few days later. Joseph I. Wittman was subsequently appointed the Chapter 7 Trustee.

A short time later, on October 12, 2000, the Smalls moved to convert the case back to Chapter 13, alleging that their plan "provided for full payment of all secured creditors through the sale of two houses in which the Debtors have an interest," so creditors would not be prejudiced if the case were re-converted. (Doc. No. 72) Both the Trustee and Gold Bank objected, and the Smalls ultimately withdrew the motion. Again, almost a full year after they knew of their inheritance of the property, Debtors were still showing no present intent to use the 12th Street property as their homestead.

In November 2000, the Smalls filed a motion to indefinitely extend the time for entry of a discharge order (Doc. No. 85). They indicated they had sufficient assets, which the Trustee would be liquidating, to pay all creditors in full, and noted that if full payment did occur, they would no longer

need a Chapter 7 discharge. This motion was granted. Later, in July 2001, however, they sought and obtained an order granting their discharge.

In February 2001, the Smalls' attorney filed a motion to withdraw (Doc. No. 95). He served the Smalls by mail addressed to Debtors' original 1110 Calhoun Street address, as well as to an address in Norton, Kansas (Doc. Nos. 95 and 102). The return receipt for the letter mailed to Norton, Kansas, shows, however, that it was actually delivered to Mr. Small at the 706 North 12th Street address in Marysville.

In May 2001, the Smalls rehired their attorney, and he entered a new appearance. On May 14, 2001, some twenty-two months after originally filing bankruptcy, and some eight months after conversion to a Chapter 7, the Smalls filed amended bankruptcy Schedules A, B, C, and F. On Schedule A, they listed both homes in Marysville, even though by that date, their original residence on Calhoun had been foreclosed and sold by Gold Bank. On Schedule C, for the first time since the inherited assets became property of the estate at least eighteen months earlier, they claimed as their exempt homestead the inherited home located at 706 North 12th Street. Both Gold Bank and the Trustee objected to the new homestead claim.

II. ISSUE

The issue in this case is whether Debtors can exempt the 12th Street property under the Kansas homestead exemption, which real estate was inherited within 180 days of filing, even though there is no evidence they were occupying the residence either at the time of inheritance or within a reasonable time thereafter, and there is no evidence that they had the present intent to do so at the point the property became property of the estate. The Court finds that they cannot.

III. CONCLUSIONS OF LAW

Section 522(b) of the Bankruptcy Code[2] specifies that a debtor can take the exemptions enumerated in § 522(d) unless applicable state law specifically provides otherwise. Kansas has opted out of the federal plan, and has enacted its own set of exemptions. *See In re Lampe*, 331 F.3d 750, 754 (10th Cir. 2003) (citing K.S.A. 60-2312). "When determining the validity of a claimed state law exemption, bankruptcy courts look to the applicable state law." *In re Urban*, 262 B.R. 865, 866 (Bankr. D. Kan. 2001). A debtor's right to an exemption is generally determined as of the date the bankruptcy petition is filed. *In re Currie*, 34 B.R. 745, 748 (D. Kan. 1983); *see also* § 348(f)(1)[3] (providing that the relevant date for determining property of the Chapter 7 estate after conversion from Chapter 13 is the original filing date). However, under §541(a)(5)[4] of the Bankruptcy Code, property

---

[2]All statutory references are to the Bankruptcy Code, 11 U.S.C.A. § 101, et seq., unless otherwise specified.

[3]Section 348(f)(1)(A) reads, in pertinent part, as follows:

> (f)(1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title—
>
> (A) property of the estate in the converted case shall consist of property of the estate, as of the filing date of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion.

[4]Section 541(a)(5) provides:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> . . . .
>
> (5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days of such date—
>
> (A) by bequest, devise, or inheritance.

becomes property of the estate when it is inherited within 180 days of the bankruptcy filing. *See also* Fed. R. Bankr. P. 1007(h) (debtor to supplement schedules within ten days after learning of assets covered by §541(a)(5)). This provision applies to cases filed under Chapter 7 as well as Chapter 13. *See* §103(a). Accordingly, the 12th Street property that Ms. Small inherited is treated as if it had been property of the estate on July 26, 1999, the original date Debtors filed their Chapter 13 case.

It is well established that Kansas exemption laws are to be liberally construed in favor of the exemption. *In re Mueller*, 71 B.R. 165, 167 (D. Kan. 1987), *aff'd* 867 F.2d 568 (10th Cir. 1989). The Kansas Constitution provides for a homestead exemption, *see* Art. 15, §9, but the legislature has expanded the exemption somewhat in K.S.A. 60-2301, which provides, in pertinent part:

> A homestead to the extent of 160 acres of farming land, or of one acre within the limits of an incorporated town or city, or a manufactured home or mobile home, *occupied as a residence by the owner or by the family of the owner*, or by both the owner and family thereof, together with all the improvements on the same, shall be exempted from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists. . . .

(Emphasis added). Kansas case law has made the occupancy requirement more flexible than it might have been, declaring that homestead protection can attach from the time property is purchased or otherwise acquired without immediate occupancy so long as upon acquisition, the new owner has a present intent to occupy the property as a homestead and then actually does occupy it within a reasonable time. Roger L. Theis & Karl R. Swartz, "Kansas Homestead Law," 65 Journal of the Kansas Bar Ass'n 20, 24 (1996); *see, e.g., Ingels v. Ingels*, 50 Kan. 755, 760-65 (1893) (purchased property); *Hammond v. Neely*, 138 Kan. 885 (1934) (inherited property); *Angola State Bank v. Fry*, 130 Kan. 641 (1930) (inherited property).

Although the Kansas homestead exemption must be applied liberally, this Court is convinced that in order to secure the exemption when actual occupation of the claimed homestead has not occurred by the time the owners file for bankruptcy, the owners must have had, on the date of the bankruptcy petition, a present intent to occupy the property as their homestead that is followed within a reasonable time thereafter by actual occupation of the home. *See Ingels v. Ingels*, 50 Kan. at 760-65. When the property is acquired by postpetition inheritance rather than prepetition purchase, the debtors must have, or at least form, the homestead intent when they learn of the inheritance and must actually occupy the premises within a reasonable time thereafter. *See Hammond v. Neely*, 138 Kan. at 888-89; *Angola State Bank v. Fry*, 130 Kan. at 642-43.

In *Ingels v. Ingels*, the Supreme Court noted that, "'While occupation need not always be instantaneously contemporaneous with purchase, to create a homestead, yet the purchase must always be with the intent of present, and not simply of future, occupancy.'" 50 Kan. at 763 (quoting *Swenson v. Kiehl*, 21 Kan. 533, syl. ¶2 (1879)). The court pointed out that the Kansas Constitution defined a homestead to be property "occupied as a residence." 50 Kan. at 763-64. Most of the cases where the Kansas courts allowed additional time to occupy the premises involved a fact pattern where the acquired land was vacant and a home needed to actually be constructed. In such cases, as the *Ingels* court stated: "[W]e are bound to declare the law as we find it; and, while this court in the cases cited [allowing time for debtors to build or renovate] has given the constitutional provision a liberal construction for the purpose of fully securing to needy debtors the beneficent exemption secured to them by the constitution, yet we may not wholly dispense with the requirement of occupancy." *Id*. at 765.

Under Kansas law, the party claiming homestead protection has the burden of proving the establishment of the homestead. *See Beard v. Montgomery Ward & Co.*, 215 Kan. 343, 344 & 349 (1974); *Bellport v. Harder*, 196 Kan. 294 (1966). In bankruptcy, however, Federal Rule of Bankruptcy Procedure 4003 governs exemptions, and subsection (c) of that Rule provides: "In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed." This means that the claimed exemption is presumed to be valid, and Gold Bank and the Trustee have the burden of production and persuasion on their objections to the Smalls' homestead exemption claim. *In re Robinson*, 295 B.R. 147, 152 (10th Cir. B.A.P. 2003).

If the Bank and the Trustee produce sufficient evidence to rebut the exemption, however, the burden shifts to the Smalls to come forward with evidence to support their exemption. *Id*. Because debtors make only minimal factual assertions in claiming exemptions, the burden to rebut the presumption that the exemption claim is proper should not be a difficult one to satisfy. Nevertheless, the ultimate burden of persuasion remains on Gold Bank and the Trustee. *Carter v. Anderson (In re Carter)*, 182 F.3d 1027, 1029 n. 3 (9th Cir. 1999); *see also In re Gregory*, 245 B.R. 171, 174 (10th Cir. B.A.P.), *aff'd without opinion* 246 F.3d 681 (10th Cir. 2000) (citing *Carter*'s discussion of respective burdens).

The Court is convinced that the evidence before it is sufficient to rebut the presumption that the Smalls properly claimed a homestead exemption in the inherited house. Debtors admit that "Ms. Small's mother was alive and living in that [12th Street] home [on the date the Chapter 13 petition was filed], and Ms. Small had no ownership interest in it." *See* Debtors' Memorandum in Opposition to the Objections of Gold Bank and the Trustee to Debtor's [sic] Homestead Exemption (Doc. No. 144).

Thus, it appears that the 12th Street property was ready to be occupied by the Smalls upon the mother's death. For whatever reason, so far as the record before the Court shows, they did not move to the house until five months after they inherited it. While Ms. Small reported her mother's death in an apparently timely manner by calling the Chapter 13 Trustee, the Smalls did not file supplemental schedules and exemption claims within ten days after learning of Ms. Small's inheritance or seek more time to do so, as required by Rule 1007(h), and did not file them at any time before reporting five months later that they had moved into the house.

In addition, the Smalls apparently failed to tell their own attorney of any intent to occupy the inherited house as a homestead, as demonstrated by his mailing of his Motion to Withdraw, in February 2001, to the Calhoun Street address. Furthermore, even after they occupied the house in April 2001, the Smalls filed a number of pleadings indicating they intended to sell the inherited house to pay their creditors, and did not intend to establish the house as their homestead. These circumstances, and the assertions found in Debtors' own pleadings, are enough to rebut the presumption that the Smalls' homestead claim was valid, and require them to produce evidence to support the claim. Specifically, they needed to produce evidence to show that: (1) they formed an intent to make the 12th Street house their homestead as soon as they learned they had inherited it, and (2) they occupied it within a reasonable time after they inherited it.

The Smalls' position is supported by little evidence of their intent and none at all to explain their five-month delay in occupying the house. The only evidence that suggests they might have intended to make the 12th Street house their homestead is: (1) they were having trouble making their payments on Gold Bank's mortgages on their Calhoun Street home, while the 12th Street house was apparently

unencumbered, making it financially the more desirable homestead; (2) they moved into the inherited house at least by April 2000; and (3) they claimed the 12th Street house as their homestead in the amended Schedule C they filed in May 2001. The first two pieces of evidence give only uncertain indications of their intent, and those are overcome by the repeated statements in their subsequent pleadings that they intended to sell the inherited house to pay their creditors. The third piece of evidence came too late to override their earlier indications that they did not intend to make the house their homestead.

Even more damaging for their homestead claim, there is simply no evidence to indicate that the five-month delay between the inheritance and their occupation of the house was reasonable. Ms. Small's mother was living in the house until her death, and nothing before the Court suggests that the house needed any repairs or renovation, or that the Smalls were having such work done or could not for any other reason have moved into the house more or less immediately. In short, the Smalls failed to satisfy their burden to produce evidence supporting their exemption claim.

A full consideration of all the evidence convinces the Court that Gold Bank and the Trustee have satisfied their ultimate burden of persuasion as well. So far as the Court can tell, the 12th Street house was available and ready for the Smalls to occupy at any time after Ms. Small's mother died. Nevertheless, nothing in the record indicates they did occupy it until five months after the death. The Smalls not only did not file supplemental schedules and exemption claims within ten days after learning of Ms. Small's inheritance, or seek more time to do so, they waited for eighteen months after the death to amend their schedules to claim the inherited house as their homestead. Although the Smalls were having trouble paying the mortgages on their Calhoun Street home, nothing before the Court indicates

they had any thought of occupying the inherited house before they changed their address with the Court in April 2000, five months after they received their interest in the 12th Street house.

A letter from their attorney to the Chapter 13 Trustee dated February 28, 2000, three months after the inheritance, still referred to the Calhoun Street house as their "residence." Later pleadings the Smalls filed also contradict any assertion that they intended to make the inherited house their homestead as soon as they learned of their interest in it. They indicated in an August 2000 response to a motion to convert or dismiss that they were trying to sell the inherited house to pay their creditors in full, and in an October 2000 motion to convert their case back to Chapter 13 that they would pay their secured creditors in full by selling two houses, one of which had to be the inherited house. Even as late as November 29, 2000, Debtors asked the Court to delay entry of their Chapter 7 discharge because they thought they had sufficient assets that would be liquidated under the Chapter 7 Trustee's supervision to pay all their creditors in full; the full payment of creditors seems to have been possible only if the inherited house was sold along with other nonexempt assets.

The only way Debtors could exempt the 12th Street property is if they had been occupying that residence along with Ms. Small's mother on the date of filing or some other time before her death, intending to make it their homestead if she should die, or if on learning they had inherited it, they had immediately decided to move into the home and maintain it as their residence, and then done so within a reasonable time thereafter. *See, e.g, Angola State Bank v. Fry*, 130 Kan. 641 (1930) (holding that immediate notice to tenant of intent to occupy property received from inheritance, coupled with taking of possession a few days after the lease expired, a period of less than two months, was reasonable); *cf., In re Meachen,* 217 B.R. 877 (Bankr. D. Colo. 1998) (holding that when property comes into

bankruptcy estate via § 541(a)(5), debtor may claim all exemptions available to him as if the property was his as of date of filing, but to do so, debtor must meet the criteria for a valid homestead exemption under state law on date of filing or date he became entitled to his share of the probate estate); *In re Parrish*, 2002 WL 31474172 (Bankr. M.D.N.C. 2002) (holding against trustee in finding that under the North Carolina homestead law, which also requires debtor to be using the property as a residence, debtor-son who resided in mother's home, with mother, on the date of his bankruptcy could properly exempt real estate as his homestead when his mother died within 180 days of filing).

The evidence does not show that the Smalls had the requisite intent any time before they amended their schedules eighteen months after the inheritance to claim the 12th Street property as their homestead, and other pleadings they filed show that they did not intend to make the property their homestead during that intervening time. Even if the Smalls had the requisite intent, the evidence before the Court does not explain their failure to move into the 12th Street house for five months after they inherited it. The Court finds this unexplained delay to be unreasonable. Debtors thus do not meet the criteria for a valid homestead exemption under state law on the date of the inheritance, or within a reasonable time thereafter. *Cf., Ingels v. Ingels,* 50 Kan. at 765 (holding that the rights of the parties are fixed at the time of the levy, and no subsequent act of the debtor to establish a homestead can change them).

In their brief, Debtors have chosen not to concentrate on the impact of Kansas homestead law on this issue, but have instead relied on an Eighth Circuit decision to support their amended homestead claim. In *Armstrong v. Lindberg (In re Lindberg)*, 735 F.2d 1087 (8th Cir. 1984), the Eighth Circuit held that while the debtors were in a Chapter 13 bankruptcy case, they could move from one property

to another they also owned when they filed their petition, and then exempt the second property as their homestead when the case was converted to Chapter 7. However, this case has been overruled by the Eighth Circuit in a more recent decision, due to the fact that Congress subsequently added §348(f)(1) to the Bankruptcy Code in 1994, which clearly indicates that the facts existing on the date of the original Chapter 13 filing control what exemptions debtors can claim. *In re Alexander*, 236 F.3d 431, 432-33 (8th Cir. 2001). Legislative history to that amendment also makes clear that the intent of the amendment was to legislatively overrule cases holding that the date of conversion, as opposed to the date of filing, was the appropriate time for determining property of the estate upon conversion. *See* H.R. Rep. No. 103-834, at 42-43 (1994).

The Smalls also argue that because the 12th Street house was not property of their bankruptcy estate when they commenced their case, Gold Bank and the Trustee must impliedly be admitting that the date of conversion controls what constitutes property of their Chapter 7 estate, since they are attempting to obtain this property for the estate. This argument overlooks the fact that the 12th Street property became property of the Chapter 13 estate, by operation of §541(a)(5), when Ms. Small's mother died within 180 days of filing, which was long before the case was converted. Thus, this argument ignores the fact that had the Debtors originally filed a Chapter 7, this real estate would have been treated as property of the estate on the date of that filing.

IV. CONCLUSION

The Debtors' attempt to claim the inherited 12th Street house as their exempt homestead, well over a year and a half after that property became property of the estate, must fail. The house became property of the estate when Ms. Small's mother died, and remained property of the estate when their case was converted to Chapter 7. They cannot satisfy the requirements of the Kansas homestead law, because they were not occupying the house at the time their bankruptcy was filed or at the time of the inheritance, they did not manifest a present intent to occupy the house as their residence at the time of the inheritance, and they did not actually occupy it within a reasonable time. For these reasons, the objections of Gold Bank and the Trustee to the Smalls' amended homestead claim are hereby sustained.

IT IS, THEREFORE, BY THIS COURT ORDERED that the objections to Debtors' Amended Exemptions, filed both by Trustee, Joseph I. Wittman, and Gold Bank, are sustained, and the property located at 706 N. 12th Street, Marysville, Kansas is not exempt.

IT IS SO ORDERED this _____ day of November, 2003.

_____

Janice Miller Karlin, United States
Bankruptcy Judge

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the Order Granting Objections to Debtors Amended Homestead Claim was deposited in the United States mail, postage prepaid on this 17th day of November, 2003, to the following:

Paul D. Post
5897 SW 29th St.
Topeka, Kansas 66614

Anne Baker
WRIGHT, HENSON, SOMERS, CLARK & BAKER, LLP
100 SE 9th Street, 2nd Floor
P.O. Box 3555
Topeka, Kansas 66601-3555

Joseph I. Wittman
Chapter 7 Trustee
Columbian Building
112 SW 6th , Suite 508
Topeka, Kansas 66603

DEBRA C. GOODRICH
Judicial Assistant to:
The Honorable Janice Miller Karlin
Bankruptcy Judge